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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

82-1118

NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND,T. E. NOLAN, IRVING WISCH, WILLIAM H. MOSLEY, SR., KEPLER VINCENT, ROCCO F. DEPERNO, MACK CANZONERI, VICTOR MOUSSEAU, and PAUL BUSH as Trustees of the New York State Teamsters Conference Pension and Retirement Fund,

Petitioners,

vs-

CLARA DUCHOW, Individually and as Administratrix of the Estate of HERMAN DUCHOW, Deceased

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

FRANK J. DOLCE
Counsel of Record COLLINS, COLLINS & DI NARDO,P.C.
415 Franklin Street
Buffalo, New York 14202
(716) 854-8195

The employee attained normal retirement age upon the 10th anniversary of his participation in the pension plan, but did not have 10 years of service under the plan. The plan denied the employee any benefits because the employee did not meet the plan's vesting requirement of 10 years of service. The Court of Appeals for the Second Circuit held that Section 203(a) of the Employee Retirement Income Security Act (ERISA), 29 U.S.C., Section 1053(a) requires the plan to vest the employee in his accrued benefits solely upon the attainment of normal retirement age.

QUESTIONS PRESENTED.

1. Whether the first clause of ERISA's minimum vesting provision (Section 203(a)), which incorporates the requirement that normal retirement age occurs upon an employee's 10th anniversary of participation, should be read (a) as an independent ground for vesting, or (b) as part of the ERISA provision (Section 203(a)(2))requiring vesting upon the completion of 10 years of service?

2. Does the term "10th anniversary" incorporated in the minimum vesting provision refer to (a) 10 years of service for which contributions have been made on behalf of the employee, or (b) 10 years of time following the employee's entry into the plan regardless of service or contributions?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982.

No. 82-

NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND, T.E. NOLAN, IRVING WISCH, WILLIAM H. MOSLEY, SR., KEPLER VINCENT, ROCCO F. DEPERNO, MACK CANZONERI, VICTOR MOUSSEAU, and PAUL BUSH, as Trustees of the New York State Teamsters Conference Pension and Retirement Fund,

Petitioners,

vs-

CLARA DUCHOW, Individually and as Administratrix of the Estate of Herman Duchow, Deceased,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

The New York State Teamsters Conference Pension and Retirement Fund, T. E. Nolan, Irving Wisch, William H. Mosley, Sr., Kepler Vincent, Rocco F. DePerno, Jack Canzoneri, Victor Mousseau and Paul Bush, as Trustees of the New York State Teamsters Conference Pension and Retirement Fund petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Second Circuit entered on October 6, 1982. Respondent, Clara Duchow, opposes the Petition for a Writ of Certiorari.

Collins, Collins and DiNardo, P.C.
Attorneys and Counselors at Law • 415 Franklin Street • Buffalo, New York 14202 • (716) 854-8195

OPINIONS BELOW.

District Court.

A Decision and Order was issued by the district court, Chief Judge John T. Curtin, which denied plaintiff's motion for partial summary judgment and granted defendants' motion for summary judgment. Judge Curtin dismissed plaintiff's cause of action which alleged that the defendants violated the Employee Retirement Income Security Act of 1974, 29 U.S.C., Section 1001 et seq. (ERISA). The Decision and Order is not officially reported. Pursuant to the Decision and Order, judgment was entered on August 17, 1981.

Court of Appeals.

On October 6, 1982, the Court of Appeals for the Second Circuit reversed the judgment of the District Court. The opinion of the Court of Appeals is reported at 691 F. 2d 74 (2nd Cir. 1982).

Jurisdiction.

The decision of the Court of Appeals was entered October 6, 1982. The jurisdiction of this court is invoked pursuant to 28 U.S.C., Section 1254(1).

Statutory Provisions Involved.

1. Sections 2, 3(22), 3(23), 3(24), 202(a)(1), 202(a)(2), 203(a), 203(b)(2)(A), 204(b)(3)(A), and 206(a) of the Employee Retirement Income Security Act, 29 U.S.C., Sections 1001, 1002(22), 1002(23), 1002(24), 1052(a)(1), 1052(a)(2), 1053(a), 1053(b)(2)(A), 1054(b), 3(A), and 1056(a).

2. Section 411(a)(8) of the Internal Revenue Code, 26 U.S.C., Section 411(a)(8).

STATEMENT OF THE CASE.

On October 6, 1982, a three-judge panel[1] of the United States Court of Appeals for the Second Circuit reversed a district court judgment which had denied Clara Duchow's request for a declaration of entitlement to pension fund benefits under the Employee Retirement Income Security Act, 29 U.S.C., Section 1001 et seq. (ERISA). The court of appeals, in reversing, held that ERISA requires that pension benefits become vested upon an employee's attainment of "normal retirement age," as defined in the Act, and that Clara Duchow was entitled to pension benefits, both as an individual and as Administratrix of the estate of Herman Duchow. The court remanded for entry of partial summary judgment in favor of plaintiff and for a determination of the amount of benefits. The New York State Teamsters Conference Pension and Retirement Fund, T. E. Nolan, Irving Wisch, William H. Mosley, Sr., Kepler Vincent, Rocco F. DePerno, Jack Canzoneri, Victor Mousseau and Paul Bush, as Trustees of the New York State Teamsters Conference Pension and Retirement Fund ("the Fund"), petitioners, seek review of the court decision.

General Background.

Herman Duchow became an employee of Southland Frozen Food, Inc. ("Southland"), on September 1, 1963. Subsequently, Southland entered into a collective bargaining agreement with Local No. 558 of the International Brotherhood of Teamsters. On February 1, 1969, Duchow became a member of the pension plan ("the Teamsters Plan")established by the Fund. In February of 1977, at the age of 69, Duchow applied to the Board of Trustees of the Fund for pension benefits. His application

1. Circuit Judges Mansfield and Kearse; District Judge Cabranes, United States District Court for the District of Connecticut, sitting by designation.

was denied. On May 31, 1977, Duchow terminated his employment with Southland. He thereafter returned to Southland and was employed there in January and February 1979. During this period, Duchow reapplied for pension benefits. This application, too, was denied.

In denying Duchow's applications, the Trustees took the position that Duchow had no vested pension rights because he had not fulfilled the Teamsters Plan's service requirements. They relied on Teamsters Plan provisions that, in order to receive pension benefits, an employee must have attained either

(a) Age 60 with 15 or more years of past and future service combined, or

(b) Age 65 with 10 or more years of future service.

Although Duchow was over the age of 65, he concededly met neither of the Teamsters Plan's alternative requirements with respect to periods of service, in that he had acquired 5.4 years of past service and 8.9 years of future service.

An action was commenced by Herman Duchow in 1979. The district court's jurisdiction was predicated on Section 502 of ERISA (29 U.S.C., Section 1132). Upon his death, plaintiff, Clara Duchow, as his Administratrix and widow, was substituted for him. She sought to recover for benefits to which Duchow was entitled during his lifetime, as well as benefits to which she was personally entitled. Her entitlement to survivor benefits depended on the eligibility of Herman Duchow to receive benefits. The district court granted summmary judgment in favor of the defendants, petitioners herein, on the ground that Duchow had not met the Teamsters Plan's service requirements. The plaintiff appealed the district court's decision to the United States Court of Appeals for the

Second Curcuit. The Second Circuit reversed the district court in a decision by Judge Amalya Kearse.

The Decision of the District Court.

The district court determined that since Herman Duchow failed to satisfy the 10 year service requirement under the Teamsters Plan, he was not entitled to receive pension benefits from the Fund. Therefore, the court held Duchow's widow was not entitled to survivor benefits. In reaching this conclusion, the court rejected plaintiff's argument that Section 203 of ERISA, 29 U.S.C., Section 1053, contains two separate vesting requirements, the first (Section 203(a)) requiring the nonforfeitability of benefits upon normal retirement age regardless of the plan's service requirements, and the second (Section 203(a)(2)) providing for preretirement vesting according to schedules set out in the statute. The court found that the case of Caterpillar Tractor v. Commissioner, 72 T.C. 1088 (1979), upon which plaintiff had relied, was distinguishable in that it concerned a plan which provided for a mandatory retirement age, thereby effectively preventing the vesting of rights in employees hired at age 57 or older. In Caterpillar, the tax court held that the mandatory retirement provisions of the plan under review violated that part of Section 203(a), providing that,

> ...an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age...

The district court concluded that since the Teamsters Plan did not prohibit Mr. Duchow from continuing to work until he has attained sufficient service credit for vesting, the Teamsters Plan was not

violative of Section 203(a).

The Decision of the Court of Appeals.

The court of appeals reversed the judgment of the district court. The court's decision was based on its interpretations of statutory language, legislative history, and the declared purposes of ERISA. The court of appeals determined that both the format of Section 203(a) and the disparate contents of its conjoined parts indicate that two distinct vesting requirements are imposed. The court also determined that the legislative history indicated a Congressional intent to preserve already existing vesting rights, and that Congress believed that vesting of accrued benefits on retirement age regardless of length of service was a benefit already enjoyed by employees. Finally, the court found that the imposition of two distinct vesting requirements is consistent with the purpose of ERISA, i.e., to protect beneficiaries by reducing the risk of loss of pension benefits. In construing that part of the definition of "normal retirement age," referring to a participant's "10th anniversary...in the plan" the court found that no service requirement was intended to be imposed. The court concluded that Duchow became entitled on the tenth anniversary of the commencement of his participation in the Teamsters Plan to receive whatever pension benefits he had accrued by virtue of his years of participation in the Teamsters Plan. The court cited in footnote 3 three tax court decisions which reached the same conclusion in interpreting a substantially identical conterpart provision in the Internal Revenue Code, 26 U.S.C., Section 411(a) (1976); Trustees of the Taxicab Industry Pension Fund v. Commissioner (1981), T.C.M. (CCH), Para. 651; Board of Trustees of New

York Hotel Trades Council and Hotel Association of New York City, Inc. Pension Fund v. Commissioner (1981), T.C.M. (CCH), Para. 597; Caterpillar Tractor Co. v. Commissioner, 72 T.C. 1088 (1979).

REASONS FOR DENYING THE WRIT.

Petitioners contend that the Second Circuit Court of Appeals decision, in interpreting the uniqueness and distinction between normal retirement age vesting and preretirement vesting, has deprived an essential part of the vesting standards of the Employee Retirement Income Security Act (ERISA).

Petitioners are mistaken. The Second Circuit Court of Appeals decision, in logically analyzing and highlighting the well recognized principles of normal retirement age vesting and preretirement vesting, has brought clarity and meaning to the vesting standards of ERISA.

Petitioners are in error in stating that the Second Circuit Court of Appeals has created two vesting standards. Rather, Congress, in enacting Section 203(a) of ERISA, 29 U.S.C., Section 1053(a), has chosen to establish the various minimum vesting requirements; including, normal retirement age vesting without regard to service, immediate 100% vesting of employee contributions, and preretirement vesting depending on periods of covered service.

This sophisticated vesting framework established by Congress does not discriminate in favor of older employees and against younger employees as petitioners contend. Employees, no matter what age, are afforded the same opportunities to satisfy the age-neutral, but service

dependant, preretirement vesting schedules adopted by their particular pension plans and authorized by Section 203(a)(2) of ERISA. Congress established preretirement vesting in an attempt to stem the tide of lost pension benefits by pension plan participants who decide to terminate employment with their contributing employer prior to attaining normal retirement age. Furthermore, in recognizing normal retirement age vesting, Congress has afforded vested rights to employees that are fortunate enough to attain "normal retirement age" during their employment.

Far from promoting age discrimination, the sophisticated vesting framework of Section 203(a) of ERISA, as highlighted by the Second Circuit Court of Appeals decision, manages to afford vested rights to an increasing number of mobile employees who have more than one employer over the course of their work life, while retaining vested rights for those who attain retirement age while still employed by their contributing employer.

Petitioners also erroneously contend that the Second Circuit Court of Appeals decision will have a deleterious effect on the acturial soundness of the Fund, thereby defeating the purpose of federal pension legislation.

Petitioners' dire prediction is based upon the misconception that the Fund will be forced to make enormous outlays in benefits which have not been planned for or contemplated by the Fund to any and all individuals attaining normal retirement age. Petitioners' arguments are mistaken in that they ignore the role that the participation, break-in-service and benefit accrual rules found in Sections 202, 203 and 204 of ERISA play in limiting the actual number of employees (and the size of

their accrued benefits) who would qualify to receive a benefit upon attaining normal retirement age. Petitioners' arguments are also greatly exaggerated in that they ignore the fact that most employees who attain normal retirement age with their contributing employer also have accumulated sufficient credited service to satisfy the requirements of their plan's preretirement vesting schedule and therefore already have obtained vested rights prior to attaining retirement age irrespective of the applicability of normal retirement age vesting. Furthermore, petitioners fail to mention that employer contributions will have been made on behalf of all employees who later obtain a vested pension benefit upon attainment of normal retirement age, and that these contributions will readily finance the rather insignificant amount of normal retirement benefits due this limited number of retirees.

It is therefore not necessary for this Court to review the well reasoned Second Circuit Court of Appeal decision as requested by petitioners herein.

POINT ONE.

UNDER BASIC CONCEPTS OF STATUTORY CONSTRUCTION, THE COURT OF APPEALS WAS CORRECT IN CONCLUDING THAT PENSION RIGHTS VEST ON NORMAL RETIREMENT AGE WITHOUT REGARD TO LENGTH OF SERVICE.

A. The court's decision requiring the vesting of accrued benefits on normal retirement age is supported by the plain language of the statute.

Petitioners erroneously contend that the plain language of Section 203(a) of ERISA supports the position that vesting of pension benefits upon the attainment of normal retirement age is contingent upon the completion of a period of service.

The Court of Appeals, in a thoughtful analysis of the statutory language of Section 203(a) and Section 3(24), correctly held that a reading of the plain language of the statute clearly indicated that normal retirement age vesting differs substantively from preretirement vesting in that the completion of a specified period of service is not required for normal retirement age vesting as it is for preretirement vesting.

Petitioners mistakenly contend that the second "shall" contained in Section 203(a) refers to the normal retirement benefit and therefore requires that the normal retirement benefit must satisfy the additional vesting requirements set out in paragraph (1) and (2) of Section 203(a). Petitioners' understanding, however, defies and strains well accepted principles of grammer which clearly indicate that both the uses of the word "shall" in Section 203(a) are referring to those conditions that "each pension plan" must meet.

A correct grammerical reading of Section 203(a) supports the Court of Appeals understanding that "each pension plan""shall provide" normal retirement age vesting "and in addition""shall satisfy" the two additional vesting requirements set out in paragraph (1) and (2); that is, immediate 100% vesting of employee contributions, and pre-retirement vesting according to one of the three minimum vesting schedules established under Section 203(a)(2).

No where, in the vast provisions of ERISA, has Congress expressly attached a service requirement to the definition of "normal retirement benefit" as petitioners contend. Rather, "normal retirement benefit" is explicitly defined as:

> "...the greater of the early retirement benefit under the Plan, or the benefit under the Plan commencing at normal retirement age..."

Section 3(22), 29 U.S.C., Section 1002(22). Aforesaid definition of "normal retirement benefit" is clearly devoid of any mention of a service requirement.

Petitioners further contention that the Court of Appeals decision misinterprets the legislative history regarding Section 203(a) is completely unfounded and proves erroneous when one examines the Court of Appeals logical review and analysis of the pertinent committee reports.

B. The definition of normal retirement age does not incorporate a ten year service requirement.

The Court of Appeals decision regarding the intended meaning of the term "anniversary" found in the definition of normal retirement age under Section 3(24) of ERISA is well reasoned and explicitly rejected the strained construction that petitioners seek to give it.

In attempting to equate the term "tenth anniversary" with "ten years of service", petitioners offer several convaluted arguments.

First, petitioners erroneously argue that any amount of service - even one day - in each of ten consecutive years culminating in retirement after 65 is sufficient for vesting. Once again petitioners are mistakenly confusing preretirement vesting principles, such as length of service requirements, with normal retirement age vesting. If a plan participant attains normal retirement age, that is, he attains the latter of either age 65 of the 10th anniversary of the commencement of his participation in the Plan, while still in the employ of his contributing employer, he would indeed become vested in his accrued benefit at that time. However, the determination of whether the employee would actually

be a plan participant at the time of attaining normal retirement age and would have accumulated any accrued benefits is intricately tied into principles of covered service. Consequently, petitioners' example of an employee with one day of service in each of 10 consecutive years would result in the following: (a) since the employee only worked one day a year he would not meet the hour and year of service requirements found in the participation rules of the Plan and Section 202 of ERISA and hence would never qualify for participation in the plan; (b) no benefit would, in fact, accrue to the employee who worked only one day a year since he would not satisfy the minimum hour and year of service requirements found in the benefit accrual rules of the Plan and ERISA. Obviously, the employee who works one day a year and thereby fails to satisfy the participation and benefit accrual service rules would not have accumulated any accrued benefits, would not be a plan participant, and therefore would not qualify for a pension benefit at the attainment of normal retirement age. Petitioners' arguments concerning the definition of normal retirement age erroneously ignore the vital principles of participation and benefit accrual established by ERISA and should be rejected in light of the Court of Appeals well reasoned decision regarding the appropriate definition of normal retirement age.

Petitioners also contend that their argument that the term "10th anniversary" should be equated with "10 years of service" is supported by a Report of the Senate Committee which states that:

> "The Committee Bill takes the approach of being 'age neutral', which means that an employee's right to vested benefits depend solely on his years of service, rather than on some combination of service and age."

Sen. Rep. 93-383, 93d Cong., 2d Sess. (1974) reprinted in 1974 U.S. Code Cong. and AD News, 4890, 4931.

Petitioners however have taken the above-mentioned quotation out of context and fail to mention that the Report was referring to the age neutrality characteristics of the preretirement vesting schedules later adopted by Congress in Section 203(a)(2) of ERISA. The Senate Committee wanted, and the Congress later agreed to enact, preretirement vesting schedules that were age neutral; that is, vesting schedules that would depend on an employee's years of service and not on the age of the employee. Not in any sense can this Senate Report be said to ascribe to the contention that normal retirement age vesting should be service related.

Petitioners' further contention that the House Ways and Means Committee Report dealing with Section 206(a) of ERISA (which deals with the form and time of payment of benefits) is inconsistant with the Second Circuit Court of Appeals decision is also erroneous. The first quotation the petitioners cite from the aforementioned report highlights the parenthetical "the 10th anniversary of commencement of service". Petitioners cite the following language:

> "To insure that a participant can reasonably expect to receive his benefits during his retirement years, the committee bill requires a qualified plan (to which the basic vesting provisions apply) to commence payment of benefits to the participant...not later than ...(2) the 10th anniversary of the time the participant commenced participation in the plan...The second of the above alternatives (the 10th anniversary of commencement of service) is designed to permit a defined benefit plan to have an adequate period of time in which to fund the benefit for a person who first enters the plan at a relatively late age. H.R. Rep. No. 93-807, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S. Code and Ad. News, 4670, 4735.

Petitioners mistakenly assume that the presence of the phrase "commencement of service" in the aforementioned parenthetical means that under Section 206(a) the term "10th anniversary" equates with the term "10 years of service". However, the use of the phrase "commencement of service" in the Report simply means commencement of participation, since one commences participation through service and vice-versa. This second quotation offered by petitioners and derived from the House Report once again offers nothing to support petitioners strained definition of the term "anniversary".

As opposed to petitioners' strained arguments, the Second Circuit Court of Appeals decision upholding the consistency of attributing the normal meaning of the term "anniversary" under both Section 206(a) and Section 3(24) of ERISA is well reasoned and supported by the Act's legislative history and purposes.

Finally, petitioners offer three (3) quotations from the Senate Finance Committee Report dealing with age - weighted minimum vesting proposals to support their argument that the Court of Appeals decision is directly in conflict with the express intent of Congress. However, even a light reading of the aforementioned Senate Finance Committee Report clearly reveals that the report concerns itself with the possible characteristics of the preretirement vesting schedules being proposed by the drafters of the statute. Some drafters wanted preretirement vesting schedules partially weighted to the age of employees, while other drafters wanted the preretirement vesting schedules to depend solely on the service of employees and not on their age, thereby being age-neutral. The preretirement vesting schedules found under Section 203(a)

(2) of ERISA are the result of the drafters' compromise decision to enact preretirement vesting schedules which are as age neutral as practicable. No where does the Senate Finance Committee Report even suggest that "anniversary" should be given the same meaning as the statutorily defined term "year of service".

POINT TWO.

THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH THE DECISIONS OF OTHER COURTS WHICH HAVE INTERPRETED THE STATUTE.

Petitioners contend that this Court has, on two recent occasions, discussed ERISA's vesting provisions, and has made no mention of normal retirement age vesting.

Petitioners cite Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1980) as a recent decision which discusses ERISA's vesting provisions. Petitioners offer the following quotation from the Alessi decision:

> "...Congress, through ERISA, wanted to ensure that if a worker has been promised a defined benefit upon retirement -and if he has fulfilled whatever conditions are required to obtain a vested benefit-... he actually receives it.' (citations omitted) For this reason the concepts of vested rights and nonforfeitable rights, are critical to the ERISA scheme.

The petitioners, however, omit critical lanuage from the above quotation which conclusively demonstrates that the Court was discussing preretirement vesting in the Alessi decision; that is vesting where an employee has left employment prior to reaching normal retirement age.

In unedited from, this Court in Alessi stated:

> "Congress approved some delay in an employee's acquisition of a vested right to portions of

> his pension derived from employer contributions. Thus, ERISA specifies that this right could be hinged on a minimum length of service, but an employee reaching the minimum should not lose that right even if he does not continue working for that particular employer until reaching retirement age. That minimum period of service can be calculated under three different formulas, two of which permit gradual vesting of percentages of the accrued benefits over time. Compare 29 U.S.C. Section 1053(a)(2)(A) with Sections 1053(a)(2)(B),(C). (citations omitted) In essence, pension plans qualifying for tax treatment advantageous to the employer both must insure nonforfeiture of all accrued benefits derived from employee contributions and must use vesting and accrual rates assuring portions of the benefit derived from employer contributions to the employee should the employee leave the job before the normal retirement age. 29 U.S.C., Sections 1053 (a)(1), (2).

The emphasized language in the above quotation extracted from this Court's decision in Alessi clearly indicates that the Court was addressing the issue of service related vesting in the context of preretirement vesting; that is in the context of vesting where an employee has left employment prior to attaining normal retirement age.

The petitioners also refer to language found in footnote #10 of Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359, 366 to support their contention that this Court has held that all vesting must be related to service. However, the language found in footnote #10 of Nachman specifically refers to the functioning of Section 203(a)(2), the preretirement vesting requirements found in ERISA and makes no mention of the language found in Section 203(a) which establishes normal retirement age vesting.

In none of the above-mentioned quotations offered by petitioners is this Court concerned with the functioning of normal retirement age

vesting; that is in vesting where an employee retires upon the attainment of normal retirement age with his contributing employer. In Alessi, however, the Court clearly recognized the existance of normal retirement age vesting as a separate and distinct vesting requirement found in Section 203(a) of ERISA, 29 U.S.C., Section 1053(a), when it immediately followed its discussion of preretirement vesting with the following statement:

> "Most critically, ERISA establishes that '[e]ach pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age.' 29 U.S.C., Section 1053(a)."

This statement found in the Alessi decision demonstrates that petitioners are in error when they contend that this Court has failed to recognize normal retirement age vesting. In quoting directly from Section 203(a) of ERISA this Court has clearly recognized the existence of normal retirement age vesting.

Petitioners are correct in contending that in Alessi and Nachman the Court did not decide the issue of whether Section 203(a) requires vesting upon the attainment of normal retirement age without regard to service. Rather, in Alessi, this Court was confronted with the basic issue of whether a pension plan may reduce pension benefits by the amount of workers' compensation awards received subsequent to retirement. While, in Nachman this Court addressed the issue of whether former employees with vested interests in a pension plan that terminated a day before much of ERISA became fully effective were covered by the insurance program of the Pension Benefit Guaranty Corp. under Title IV

of ERISA notwithstanding a provision in the plan limiting their benefits to the assets in the pension fund.

Petitioners also mistakenly cite three Federal Circuit Court of Appeals decisions to support their argument against normal retirement age vesting without regard to service.

In VanFossan v. International Brotherhood of Teamsters, 649 F.2d 1243, 1246 (7th Cir. 1981) the 7th Circuit Court of Appeals, in discussing the provisions of Section 203(a) of ERISA, 29 U.S.C., Section 1053(a), stated:

> "That section provides that: 'an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and ...' in the case of an employer contribution plan, if an employee 'has at least ten years of service...' or 15 years of service, depending on the nature of the plan." (emphasis added) VanFossan v. International Brotherhood of Teamsters, 649 F.2d 1243, 1246 (7th Cir. 1981).

The above-mentioned quotation with use of the word "and" demonstrate that the 7th Circuit recognize in VanFossan two separate vesting requirements, normal retirement age vesting independent of any service requirements and preretirement age vesting based upon designated years of service under the plan. A more detailed treatment of the vesting requirement of Section 203(a) of ERISA, and especially the normal retirement age vesting requirement, was probably not offered by the 7th Circuit Court of Appeals in VanFossan because: VanFossan dealt solely with an employee who left covered employment prior to attaining normal retirement age, hence with preretirement vesting, and not with normal retirement age vesting; and VanFossan involved a situation where the Court found that

ERISA was inapplicable because the circumstances involved occurred prior to January 1, 1976, the effective date of the vesting provisions found in Section 203(a) of ERISA.

Petitioners also contend that language found in the 8th Circuit Court of Appeals decision in Hepple v. Roberts Dybdahl, Inc., 622 F. 2d 962, 964-965 (8th Cir. 1980), supports their contention that normal retirement age vesting, independant of any service requirement, does not exist as a separate vesting requirement under Section 203(a). Petitioners extract the following language from the Hepple decision to support their arguement:

> "Under the kind of plan involved in this case which provides for 100 percent vesting of employer's contributions after 10 years of covered service, there is no requirement in the statute for vesting of any lesser percentage of benefits before the required 10 years of service." Hepple v. Roberts Dybdahl, Inc. 622 F. 2d 962, 964-965 (8th Cir. 1980)

Petitioners, however, fail to note that the Hepple case solely involved preretirement vesting rights; that is, with the vested rights of an employee who left employment prior to attaining retirement age. In Hepple, the 8th Circuit Court of Appeals was presented with the issue of whether a pension plan provision for forfeiture of employer contributions for the benefit of employees with less than 10 years of service who later compete with the employer, in violation of the forfeiture clause, was void as a prohibited forfeiture of vested rights in violation of ERISA. The Court ruled that the forfeiture clause was permissable since it applied only in a situation where the competing employee left employment prior to retirement and with less than 10 years of credited

service, and before satisfying the 10 year minimum vesting requirement adopted by the plan as its preretirement vesting schedule.

Even though vesting upon attainment of normal retirement age was never at issue in the Hepple case, the 8th Circuit Court of Appeals did recognize normal retirement age vesting as a separate and distinct vesting requirement found under Section 203(a), along with preretirement vesting and automatic 100 percent vesting in employee contributions. In clearly identifying the separate existance of normal retirement age vesting, the 8th Circuit stated:

> "It is undisputed that the plan involved in this action meets these minimum requirements (the minimum vesting requirements of Section 203(a) of ERISA). It provides that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age, that an employee's own contributions are nonforfeitable, and that an employee with at least 10 years of service has a nonforfeitable right to 100 percent of his benefits from employer contribution.' (emphasis added) Hepple v. Robert Dybdahl, Inc. 622, F. 2d 964 (8th Cir. 1980)

Petitioners also contend that language contained in the 9th Circuit Court of Appeals decision in Hernandez v. Southern Nevada Culinary & Bartenders Trust, 662 F. 2d 617, 619-620 (9th Cir. 1981) is supportive of their argument against normal retirement age vesting independent of a service requirement. Petitioners provide the following quotation from Hernandez:

> "ERISA's minimum vesting provisions require only that, once an employee-participant satisfies his pension plan's length of service requirements, his right to receive his vested pension benefits matures on his reaching the normal retirement age contained in the plan." Hernandez v. Southern Nevada Culinary & Bartenders Trust, 662 F.2d (9th Cir. 1981)

However, petitioners fail to reveal or explain the following language found in the 9th Circuit Court of Appeals decision in Hernandez:

> "ERISA's minimum vesting standards are contained in Section 1053(a), which provide in relevant part: 'each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon attainment of normal retirement age and in addition ...an employee who has at least 10 years of service has a nonforfeitable right to 100 percent of his accrued benefits derived from employer contribution.'"

The aforesaid quotation outlining the minimum vesting requirements of Section 203(a) of ERISA contained in the Hernandez decision clearly demonstrates the 9th Circuit Court of Appeals' recognition of the normal retirement age vesting requirement established by ERISA.

Petitioners also fail to mention that in Hernandez the 9th Circuit Court of Appeals was confronted with an issue entirely unrelated to the issues presented in the matter at hand. In Hernandez, the 9th Circuit was presented with the issue of whether, under ERISA, the widow of an employee who has elected a "joint and survivor annuity option", and whose right to receive "accrued benefits" has become vested, is entitled to receive those benefits after his death, even though the employee died prior to reaching the normal retirement age under the Plan, and , thus, never commenced receiving any benefits. The Hernandez decision is clearly unrelated to the present matter since the 9th Circuit Court of Appeals was confronted with the situation where an employee had died prior to reaching normal retirement age and therefore with the issue of the applicability of a "joint and survivor annuity option" to such situation.

The VanFossen, Hepple and Hernandez case decisions therefore demonstrate that other courts, such as the 7th, 8th and 9th Circuit

Court of Appeals have recognized normal retirement age vesting as a separate and distinct vesting requirement found under Section 203(a) of ERISA, a vesting requirement independant of any service requirement as found under the pre-retirement vesting schedule of aforesaid section.

Furthermore, petitioners argue that in Janowski v. Teamsters Local No. 710 Pension Fund, 673 F. 2d 931 (7th Cir. 1982), the 7th Circuit Court of Appeals has found that Section 3(24) of ERISA, and the identical provision in the Internal Revenue Code, 26 U.S.C. Section 411(a)(8), in defining normal retirement age, incorporates within it a 10 year service provision.

In Janowski the Court stated:

> "Section 411(a)(8) defines normal retirement age as the earlier of: (A) the time a Plan participant attains normal retirement age under the Plan, or (B) the later of the time a Plan participant attains 65 or accumulates 10 years of credited service. 26 U.S.C., Section 411 (a)(8)." Janowski v. Teamsters Local No. 710 Pension Fund, 673 F.2d 936 (7th Cir. 1982)

This quotation, however, is then followed two sentences later with the arguments of the pension plan trustees as to the reading of Section 26 U.S.C. Section 411(a)(8):

> "In contrast, the trustees read Section 411 (a)(8) to permit them to designate any age as normal retirement age, subject to the limitations that it cannot be later than the day the participant attains age 65 unless the participant has not accumulated 10 years of credited service, in which case the participant reaches normal retirement age after 10 years of credited service." Janowski v. Teamsters Local No. 710 Pension Fund, 673 F. 2d 936 (7th Cir. 1982)

From the above quotation it is apparent that the 7th Circuit, in including a 10 year service requirement in the definition of normal retirement age, simply recited the interpretation of Section 411(a)(8) held by the pension plan trustees without actually offering a substantive ruling on the precise definition of the term "10th anniversary" found under 26 U.S.C., Section 411(a)(8)(B)(ii).

Moreover, in Janowski, the 7th Circuit Court of Appeals was never called upon to rule on the meaning to be given to the term "10th anniversary" as found in the definition of normal retirement age. Rather, the issue before the court in Janowski was whether age 65 was permissibly chosen as a normal retirement age under a new plan as amended to conform to ERISA even though age 57 was the normal retirement age under the prior plan. As is apparent, the 7th Circuit in Janowski was faced with an issue entirely unrelated to the issue of whether Section 203(a) of ERISA authorizes normal retirement age vesting independant of any service requirement and whether the language "10th anniversary", found under Section 3(24) of ERISA, equates with the term "10 years of service". These latter questions have only been directly and substantively addressed by the Second Circuit Court of Appeals, in the matter at hand, and by the three Federal Tax Court cases cited in the Second Circuit decision; Board of Trustees of New York Hotel Trades Council & Hotel Association of New York City, Inc. Pension Fund v. Commissioner (1981), T.C.M. (CCH), Para. 597, Caterpillar Tractor Company v. Commissioner, 72 T.C. 1088, (1979) and Trustees of the Taxicab Industry Pension Fund v. Commissioner, (1981), T.C.M. (CCH), Para. 651. The 7th Circuit Court of Appeals decision in Janowski is not dependant upon any particular interpretation of Section 203(a) of ERISA as are the aforementioned decisions of the

Federal Tax Court and the Second Circuit Court of Appeals. Therefore the 7th Circuit's decision is not in any sense in decisional conflict with the Second Circuit Court of Appeals opinion which directly addresses and rules on the proper structure and functioning of the minimum vesting requirements found under Section 203(a) of ERISA. Moreover, the 7th Circuit Court of Appeals dicta in the Janowski case, which discusses the meaning of "normal retirement age", is not in any manner fundamental to the Court's holding in the case and does not represent a decisional conflict among the Federal Circuit Courts warranting this Court's review.

POINT THREE.

THE PURPOSE OF ERISA IS SERVED BY THE SECOND CIRCUIT's DECISION.

The Second Circuit Court of Appeals decision addresses and serves the goals of reducing the unwarranted loss of pension benefits while maintaining the financial integrity of pension plans.

Petitioners' contention that the Court of Appeals decision would jeopardize the actuarial soundness of employee benefit funds is erroneous for numerous reasons.

Petitioners once again ignore the quite substantial role that the service requirements of the benefit accrual and participation rules of ERISA, as adopted by each particular pension plan, play in limiting the actual number of employees who could expect to receive a normal retirement benefit upon attaining normal retirement age. Petitioners, by focusing narrowly on the preretirement vesting requirements of ERISA, portray a distorted picture of legions of employees qualifying for normal retirement pension benefits solely because of the Second Circuit Court of Appeals decision. This simply is not the case. There are very few

employees that can be expected to obtain a normal retirement benefit by attaining normal retirement age while failing to actually acquire enough credited service to meet the requirement of the plan's preretirement vesting schedule. Most employees who attain normal retirement age while still in the employ of their contributing employer will be found to have worked for a period of time sufficient to satisfy any applicable preretirement vesting schedules.

For those employees who fail to accumulate enough credited service to meet the service requirements of their plan's preretirement vesting schedule, their failure is almost always due to their leaving employment prior to reaching retirement age. The Second Circuit Court of Appeals decision has no affect whatsoever on these employees who leave employment prior to retirement age. The Second Circuit's decision can only affect the relatively small number of employees who attain normal retirement age with their contributing employer while falling short of the service requirements of their plan's preretirement vesting schedule. Petitioners' fear of financial instablility attributed to the Second Circuit Court of Appeals decision simply defies reality.

Petitioners also erroneously argue that the Court of Appeals decision jeopardizes the financial soundness of the Fund because it eliminates certain "gains" that are necessary to meet the Fund's liabilities. These "gains" are identified as all those contributions coming into the Fund and made on behalf of participants who leave employment prior to the completion of 10 years of service. Petitioners note that, since these participants leave employment prior to satisfying the preretirement vesting schedule's requirement of 10 years of credited service, the contributions made on their behalf stay in the Fund as gains

to be used to offset liabilities. But once again petitioners fail to recognize that the aforesaid "necessary gains" are mostly obtained from the lost benefits of employees who leave employment prior to attaining retirement age. Hence, since the Second Circuit Court of Appeals decision does not apply to those vast numbers of employees who leave employment prior to retirement age, petitioners fail to recognize that the Second Circuit's decision will have little if any effect on reducing the so-called "necessary gains" that the Fund has come to rely on.

Moreover, petitioners ignore the fact that, for those few employees who do not satisfy a preretirement vesting schedule yet qualify to receive a pension because of their attainment of normal retirement age during employment, contributions will have actually been made to the Fund on behalf of these employees. Contributions will therefore exist to finance there normal retirement age benefits. Hence, these few employees who attain a normal retirement age benefit will not in any manner prove a drain on the Fund's assets nor place the Fund at a position of financial instability.

CONCLUSION.

The decision of the Second Circuit Court of Appeals is well reasoned and properly interprets the legislative history and purposes of ERISA. Moreover, the Court of Appeal's opinion is the first Federal Court ruling on the interpretation and interplay of Section 203(a) and Section 3(24) of ERISA, besides the three Federal Tax Court decisions as aforementioned, and is not in decisional conflict with any other Federal Circuit Court or U. S. Supreme Court decisions.

In light of the foregoing the petitioners' application for a Writ of Certiorari fails to reveal any questions concerning important matters of federal law which have a significant impact, thereby warranting this Court's attention. Therefore, respondent respectfully requests that this Court deny the Petition for Certiorari and refuse jurisdiction of this case.

Respectfully submitted,

FRANK J. DOLCE
Counsel of Record
COLLINS, COLLINS & DI NARDO, P.C.
415 Franklin Street
Buffalo, New York 14202
Tel. No. (716) 854-8195

NO. 82-1118

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

RECEIVED
APR 12 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND, T. E. NOLAN, IRVING WISCH, WILLIAM H. MOSLEY, SR., KEPLER VINCENT, ROCCA F. DEPERNO, MACK CANZONERI, VICTOR MOUSSEAU, and PAUL BUSH, as Trustees of the New York State Teamsters Conference Pension and Retirement Fund,

Petitioners

vs-

CLARA DUCHOW, Individually and as Administratrix of the Estate of HERMAN DUCHOW, Deceased

Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

CLARA DUCHOW, the respondent, respectfully moves the Court for leave to proceed herein in forma pauperis, in accordance with the provisions of Title 28, United States Code, Section 1915, and Rule 53 of this Court, and to file herein her response to the Petition for Certiorari to the United States Court of Appeals for the Second Circuit filed by petitioners in single counterpart, without printing the same. The typed Brief of Respondent in Opposition is presented herewith for filing.

The affidavit of respondent in support of this motion is filed herewith.

DATED: April 8, 1983

Respectfully submitted,

BY: _____
FRANK J. DOLCE, ESQ., of counsel for respondent

Collins, Collins and D'Amato, P.C.
Attorneys and Counselors at Law • 415 Franklin Street • Buffalo, New York 14202 • (716) 854-8195

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vs-

CLARA DUCHOW, Individually and as Administratrix of the Estate of HERMAN DUCHOW, Deceased

Respondent

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF NEW YORK)
COUNTY OF ERIE : SS:
CITY OF BUFFALO)

CLARA DUCHOW, being duly sworn deposes and says:

1. She is the respondent in the above-entitled action and makes this affidavit in support of her motion for leave to proceed in forma pauperis herein.

2. Affiant is unable because of her poverty to pay fees and costs of this case or give security therefor.

3. This is an appeal from final judgment of United States Court of Appeals for the Second Circuit and involves substantial questions of federal law, as more fully set forth in Appellant's jursidictional statement. Affiant believes that she is entitled to respond to petitioners' application for Writ of Certiorari before this Court.

Collins, Collins and D'Amato P.C.
Attorneys and Counselors at Law • 415 Franklin Street • Buffalo, New York 14202 • (716) 854-8195

Clara Duchow

Subscribed and sworn to before me
this 8th day of April, 1983.

FRANK J. DOLCE
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 19 84

TE OF NEW YORK
U.S. SUSPREME COURT : COUNTY OF

Index No.

W YORK STATE TEAMSTERS CONFERENCE PENSION D RETIREMENT FUND, T. E. NOLAN, IRVING WISCH, LLIAM H. MOSLEY, SR., KEPLER VINCENT, ROCCA F. PERNO, MACK CANZONERI, VICTOR MOUSSEAU, and UL BUSH, as Trustees of the New York State amsters Conference Pension and Retirement Fund

Petitioners

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ARA DUCHOW, Individually and as Administratrix the Estate of HERMAN DUCHOW, Deceased

Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS & SUPPORTING AFFIDAVIT

ORIGINAL

Index No.

COLLINS COLLINS & DiNARDO, P.C.
ATTORNEYS FOR Respondent

OFFICE POST OFFICE ADDRESS AND TELEPHONE
415 FRANKLIN STREET
BUFFALO, NEW YORK 14202
(716) 854-8195

PLEASE TAKE NOTICE that an *, of which the within is a copy,*
uly granted in the within action on the *day of* *, 19* *, and duly entered in the office of the Clerk*
County of *on the* *day of* *, 19* .

Yours, etc.,
COLLINS, COLLINS & DiNARDO, P.C.
ATTORNEYS FOR

DUE AND PERSONAL SERVICE of the within paper(s) and of the Notice hereon endorsed is admitted this *day of* *,19*
Attorney(s) for

TE OF NEW YORK
NTY OF } ss.:
OF

, being duly sworn deposes and says: that deponent is not a party to this action and is over 18
of age; that on the *day of* *, 19* *, deponent served the within*
upon,

action, at the above address(es) designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid rly addressed wrapper, in a official depository under the exclusive care and custody of the United States post office department within the of New York

n before me, this *day of* *, 19* .

My commission expires
Public, Erie County, N.Y.; Commissioner of Deeds, Buffalo, N.Y.

STATE OF NEW YORK)
COUNTY OF ERIE : SS:
CITY OF BUFFALO)

I, JONI MEIER, depose and sy that I am a legal secretary/ paralegal in the office of COLLINS, COLLINS & DI NARDO, P.C., attorneys of record for CLARA DUCHOW, respondent herein, and that on April 8th, 1983, pursuant to Rule 28, Rules of the Supreme Court, I served one (1) copy of the Respondent's Motion for Leave to Proceed in Forma Pauperis, on each of the parties required to be served herein, as follows:

On THOMAS J. HART, Counsel of record, LIPPMAN & HART, herein by mailing the copy in a duly addressed envelope, with first class postage prepaid, to THOMAS J. HART, counsel of record for said petitioners at his office at Suite 220, 1801 K Street, N.W., Washington, D.C. 20006;

On PETER P. PARAVATI, P.C., attorney for petitioners herein by mailing a copy in a duly addressed envelope, with first class postage prepaid, to PETER P. PARAVATI, P.C, attorneys for petitioners at his office at 217 Ruger Street, Utica, New York 13501-3687.

All parties required to be served have been served.

Joni Meier
LEGAL SECRETARY/PARALEGAL

Subscribed and sworn to before me
this 8th day of April, 1983.

FRANK J. DOLCE
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 19 84